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QUESTION PRESENTED

Whether the Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of a bi-state agency created by interstate compact, is entitled to sovereign immunity from suit in federal court under the Eleventh Amendment.

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INTEREST OF STATE AMICI CURIAE

The United States Constitution's Eleventh Amendment guarantees the sovereignty of the States of the Union and implements a constitutional policy maintaining a delicate balance of power between the Federal Government and the States. The question presented in this case, whether a bi-state agency created by interstate compact is entitled to sovereign immunity under the Eleventh Amendment, directly implicates the States' sovereignty and the States' fundamental constitutional guarantee of immunity from the jurisdiction of the federal judiciary. Because resolution of the issue at hand will have an impact on the Court's Eleventh Amendment jurisprudence and will most likely further define the Court's arm-of-the-state doctrine applicable to bi-state and single-state agencies, all State *amici curiae* herein have a significant and substantial interest in furthering the purposes served by the Eleventh Amendment and its protections.

In addition, *amici curiae* the States of New Jersey and New York, the parental States of Respondent the Port Authority of New York and New Jersey, have a strong interest in effectuating the sovereign immunity of this bi-state agency which was created by the two States in the furtherance of accomplishing State purposes and was intended by the two States to enjoy the States' rights and privileges.[1]

STATEMENT

1. The writ of certiorari currently before the Court originates from a summary affirmance by the Court of Appeals for the Third Circuit, 8 F.3d 811 (3d Cir. 1993), upholding two decisions by the District Court for the District of New Jersey, *Hess v. Port Authority Trans-Hudson Corp.*, 809 F.Supp. 1172 (D.N.J. 1992), and *Walsh v. Port Authority*

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[1] Factual assertions made by the States of New Jersey and New York in this brief with respect to the two States' relationship with the Port Authority of New York and New Jersey constitute solely the positions of New York and New Jersey and not of other State *amici*.

Trans-Hudson Corp., 813 F.Supp. 1095 (D.N.J. 1993), ruling that the Port Authority of New York and New Jersey and its wholly owned railroad subsidiary, Port Authority Trans-Hudson Corporation, are arms of the States of New Jersey and New York and may partake in these two States' Eleventh Amendment immunity. These decisions from the federal courts in the Third Circuit relied on *Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3rd Cir. 1987), *cert. denied*, 484 U.S. 953 (1987), which held that the Port Authority was the alter ego of its founding States.

2. The Third Circuit's position, however, is in direct conflict with the Second Circuit which held in *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd. on other grounds*, 495 U.S. 299 (1990), that the Port Authority was not immunized by the Eleventh Amendment. While the two Circuits apply different arm-of-the-state tests, both Circuits view the "state treasury" criterion -- whether any judgment must be satisfied out of the state treasury -- as the most important consideration. In practice, however, this factor is more than *primus inter pares* and is accorded by both Circuits a dispositive role in the arm-of-the-state analysis. Consequently, when the two Circuits disagreed over the interpretation of whether the Port Authority's debts were those of its parental States, a Circuit conflict ensued.

3. The Port Authority was created in 1921 by the States of New Jersey and New York by way of an interstate compact approved by Congress. 42 U.S. Stat. 174 (1921); Ch. 151, Laws of N.J. 1921; Ch. 154, Laws of N.Y. 1921. In creating the agency, both States declared that it was established to provide the States with "great economies" that would benefit the two States. N.J.S.A. 32:1-1 (West 1963); N.Y. Unconsol. L. §6401 (McKinney 1979). The agency was created as a regional agency and as the "joint agent" of the States for purposes of exercising "public and essential governmental functions." N.J.S.A. 32:2-23.27(7),(8),(10)(West 1963); N.Y. Unconsol. L. §7201(7),(8),(10)(McKinney 1979). The two compacting States also declared that the agency should possess those responsibilities and duties which were concurred in by the

Legislatures of the two States. N.J.S.A. 32:1-8 (West 1963); N.Y. Unconsol. L. §6498 (McKinney 1979). The Port Authority's governance is conducted by a board of twelve commissioners who, in equal part, are appointed by the Governors and confirmed by the Senates of each State as provided by the laws of each State. N.J.S.A. 32:1-5 (West 1963); N.Y. Unconsol. L. §6405 (McKinney 1979). Agency commissioners may be removed from office upon the filing of charges and following a hearing before either the Governor of New York or the New Jersey Senate, depending on the Commisioner's appointing State. Chapter 422, Laws of N.Y., 1930; N.J.S.A. 32:2-5 (West 1963). The Port Authority's Compact mandates that no action by the agency will be binding unless at least three commissioners from each State vote in favor of an action, and "[e]ach state reserves the right to provide . . . for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom." N.J.S.A. 32:1-17 and 32:2-6 (West 1963); N.Y. Unconsol. L. §§ 6417, 7151 (McKinney 1979). Likewise, each State Legislature must approve the promulgation of the Authority's regulations, N.J.S.A. 32:1-19 (West 1963); N.Y. Unconsol. L. § 64197 (McKinney 1979), and the agency is required to report to each State Legislature on an annual basis. N.J.S.A. 32:1-8 (West 1963); N.Y. Unconsol. L. § 6408 (McKinney 1979). Permitting the States to further control the agency, the enabling legislation authorizes each State's comptroller to examine at any time all of the agency's books and accounts. N.J.S.A. 32:2-31 (West 1963); N.Y. Unconsol. L. § 7071 (McKinney 1979).

4. Judicial review in the state and federal courts has resulted in findings that the Port Authority is a state instrumentality. For example: *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 484 (1939) (the Port Authority is a "state instrumentality created by New York and New Jersey"); *Newark v. Essex County Bd. of Taxation*, 254 A.2d 513 (1969) (Port Authority is the "joint agency" of New Jersey and New York); *Trippe v. Port of N.Y. Auth.*, 198 N.E.2d 585 (1964) (the Port Authority is "a governmental agency of the States of New York and New Jersey").

5. While the debts and liabilities of the Port Authority are

not the liabilities of the two founding States and while the States do not appropriate funds to the agency, the States derive from the Port Authority significant fiscal benefits. For instance, the Port Authority has committed $106 million to be spent in tandem with the New York Department of Transportation in the development of the Oak Point Rail Freight Link in the Bronx, New York. In New Jersey, the agency is funding $27 million for the New Jersey Marine Development Program. The Port Authority's Regional Economic Development Program is authorized to allocate $200 million in each of the two States for transportation, economic development and infrastructure renewal. Pursuant to instructions from the Governors of the two states, the Port Authority's 1987-1991 five-year capital plan was amended to include an additional $250 million for infrastructure projects that the States identified as critical to the region. Absent these Port Authority resources, the States of New Jersey and New York would have to obtain other funding sources in order to fulfill their needs in the Northern New Jersey-New York City metropolitan area region.

6. The States of New Jersey and New York have created the Port Authority as an instrumentality and agency of the two States and herein submit that the agency should be deemed immune under the Eleventh Amendment.

SUMMARY OF ARGUMENT

The resolution of this dispute has profound consequences to the role of the States as constitutional sovereigns in our federal system of government. For more than one hundred years, the Eleventh Amendment and its jurisprudence have accorded the States broad sovereign immunity barring a wide class of citizens' suits against the States in the federal courts. Integrating the common law doctrine of sovereign immunity into the Eleventh Amendment's guarantees to the States, the Court has expressly ruled that the Amendment's shield extends well beyond the protection of the States' fisc as the Constitution never intended to limit the States' immunity to a narrow band of suits with only direct impact on the States' centralized treasury. Quite

the opposite, under the wide coverage afforded by the doctrine of sovereign immunity, the States have been immunized from all claims and actions regardless of the situs of their financial impact except for a few instances where notions of federal supremacy demand otherwise.

While the Court's leading arm-of-the-state decisions, *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), do not expressly provide a constitutional conceptual framework for the resolution of such disputes, the Court's list of factual factors to be considered in the arm-of-the-state analysis evinces, in the aggregate, the purpose of ascertaining whether, ultimately, an entity claiming Eleventh Amendment immunity is controlled by its parental State. Hence, the Court's arm-of-the-state test turns, in toto, on whether an entity is *controlled* by the State. As the Court's relevant decisions do not assign a preeminent status to any one factor utilized in the arm-of-the-state analysis, the transformation by the lower courts of the Court's overall State control test into an examination most heavily concerned with determining the existence of direct accounting-like impact on the States' centralized treasury is a misinterpretation of the Court's analysis and contradicts underlying tenets of Eleventh Amendment jurisprudence.

ARGUMENT

A. FOR OVER A CENTURY, THE COURT'S ELEVENTH AMENDMENT JURISPRUDENCE, BASED ON PRINCIPLES OF FEDERALISM AND THE STATES' SOVEREIGN IMMUNITY, HAS CURTAILED THE AUTHORITY OF THE FEDERAL JUDICIARY AND HAS IMMUNIZED THE STATES FROM SUITS BY CITIZENS REGARDLESS OF WHETHER A MONEY JUDGMENT PAYABLE FROM THE STATE TREASURY WAS IMPLICATED

1. The Eleventh Amendment Provides the Sovereign States of the Union a Broad Fundamental Constitutional Guarantee Ensuring Freedom From Citizens' Suits in the Federal Courts

For more than one hundred years, this Court has consistently viewed the Eleventh Amendment as a pillar of our nation's federal structure and has ruled that in resolving disputes under the Amendment the Court "must be guided by 'the principles of federalism that inform Eleventh Amendment doctrine.'" *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)). Integral to these principles of federalism is the doctrine of sovereign immunity, which the Court described as "deeply embedded" and performing "a vital role" in our federal system, *Welch v. Dept. of Highways & Public Transp.*, 483 U.S. 468, 474, 488 (1987); *Pennhurst* at 465 U.S. 99. "Sovereign immunity is a common law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence." *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973) (Marshall, J., concurring in result). Under the Court's Eleventh Amendment jurisprudence it is thus "the doctrine of sovereign immunity, rather than the text of the Amendment itself, which is critical to the analysis of

any Eleventh Amendment problem," *Pennhurst* at 465 U.S. 142 (Stevens, J., dissenting), and "[t]his Court has drawn upon principles of sovereign immunity to construe the Amendment." *Port Authority v. Feeney*, 495 U.S. 299, 304 (1990).

The Eleventh Amendment was ratified with the intention of overruling *Chisholm v. Georgia*, 2 Dall 419, 1 L. Ed 440 (1793) and is an explicit limitation curtailing the powers of the federal courts over the States, *Missouri v. Fiske*, 290 U.S. 18, 25. [2] While the Amendment was narrowly tailored to overrule *Chisholm*, the "Court has recognized that its greater significance lies in the affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority under Art. III." *Pennhurst* at 465 U.S. 98. In the watershed case of *Hans v. Louisiana*, 134 U.S. 842 (1890), the Court held that, notwithstanding the Amendment's limited express exclusion of suits against a State by citizens of other States, the Amendment also barred the federal judiciary from entertaining suits brought by a citizen against her own State. In reaching this result, which relied on the substance and purpose of the Amendment rather than its overt language, the Court curtailed the authority of the federal judiciary to entertain a broad class of suits against the States.

In *Hans*, the Court determined that the States were vested with sovereign immunity at the outset of the Union's formation and that this immunity was not relinquished to the

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[2] Relying on the language of Article III, §2 of the Constitution, the Court ruled in *Chisholm* that it possessed original jurisdiction over a suit by a South Carolina citizen against the State of Georgia. This decision was received in the Union with "such a shock of surprise" that the Eleventh Amendment was proposed at the next meeting of Congress in 1795 and ratified by the States' legislatures in 1798. *Hans v. Louisiana*, 134 U.S. 1, 10 (1889). The text of the Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

central government. *Id.* at 134 U.S. 10. The Eleventh Amendment was thus viewed by the Court as clarifying the Framers' intentions and restoring the original understanding that the States could not be unwillingly haled into federal court. *Pennhurst* at 465 U.S. 98 n.7. For more than a century, the Court has consistently followed in the footsteps of this "expanded immunity doctrine," *Parden v. Terminal Railway of The Alabama State Docks Department*, 377 U.S. 184, 187 (1964), as charted by *Hans*. Without wavering, it has repeatedly affirmed that the Eleventh Amendment embodies a "broad constitutional principle of sovereign immunity," *Welch* at 483 U.S. 486, designed to serve as a guarantee of the States' sovereign rights. *Welch* at 483 U.S. 493-94. Indeed, this Court has declared that the Amendment established constitutional policy and sets forth an explicit limitation on federal judicial power of "such compelling force," *Edelman v. Jordan*, 415 U.S. 651, 677 (1974), which provides the States with no less than a "fundamental constitutional protection." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, __ U.S. __, 113 S.Ct. 684, 688 (1993).

2. Consistent with Principles of Federalism, the Court has Recognized that the Constitution Created Strong States whose Interests Must be Balanced with those of the Central Government

Part and parcel with the Court's recognition of the embodiment of sovereign immunity prerogatives within the Eleventh Amendment is the Court's recognition of the unique position held by the States as sovereigns in our constitutional confederation and that the States' "constitutional role . . . sets them apart from other employers and defendants." *Welch* at 483 U.S. 477. As members of a Union of coequal sovereign states operating under the principles of constitutional federalism, the common law doctrine of sovereign immunity has evolved and has been imbued with added significance under the Eleventh Amendment. In *Atascadero State Hospital and California Department of Mental Health v. Scanlon*, 473 U.S. 234 (1985), the Court noted that the States' Eleventh Amendment's sovereign immunity guarantee against suit in

federal court served to maintain the mandated constitutional balance of power between the States and the Federal Government. *Id.* at 473 U.S. 242. The Court underscored that "the States played a vital role in our system and that ***strong state governments*** were essential to serve as a 'counterpoise' to the power of the Federal Government." *Id.* at 437 U.S. 238 n.2; emphasis added. This balancing of State and Federal powers, the Court found, was designed to ensure the protection of "fundamental liberties," *Id.* at 473 U.S. 242, as well as to accord the States their due respect as sovereign members of the federation. *Puerto Rico Aqueduct* at 113 U.S. 689.

The presence of strong state governments in our constitutional order is required not only by juridical precepts of common law sovereign immunity but also because of the functional nature of American federalism. As the Court wrote in *Garcia v. San Antonio Metro.*, 469 U.S. 528 (1985):

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else -- including the judiciary -- deems state involvement to be." [*Id.* at 469 U.S. 546.]

To effectuate the constitutional balance between the powers of the States and the Federal Government, the Court has declared that a sovereign state must be "free from [federal] judicial compulsion in the carrying out of its policies within the limits of the Constitution," *Great Northern Life Insurance Company v. Read*, 322 U.S. 47, 52 (1943). As the Court stated:

> The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government. . . . The history of sovereign immunity and the practical necessity of unfettered freedom for government from

> crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.[*Id.* at 322 U.S. 54-55.]

In short, effectuating the Constitution's general policy that the States are sovereign and not suable without their consent, the Court has ruled that no citizen's suit may be brought against the States in the Federal judiciary except as required by principles of federalism as subsumed within the Court's narrow exceptions to the general rule.[3]

3. Consistent With Principles of Sovereign Immunity and Federalism, the Eleventh Amendment Immunizes the States Even Where the Sovereign's Treasury is Not Directly Implicated

Consistent with these views of a federal system composed of strong sovereign states and in tandem with the

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[3] While the Court has repeatedly held that the States remain vested with sovereign immunity under the Eleventh Amendment, the common law doctrine of sovereign immunity, existing prior to 1788, which provided an absolute bar to suit against the sovereign, was modified in order to accommodate principles of federalism. *Employees, supra*, at 411 U.S. 288 (1973) (Marshall, J., concurring in result). In this regard, the Court has, for instance, held: that the States' Eleventh Amendment's sovereign immunity may be abrogated by Congress pursuant to the enforcement provisions of §5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but only upon a showing of unequivocal expression of intent by Congress to overturn the constitutionally guaranteed immunity of the States, *Pennhurst, supra*; that a state official may be prospectively enjoined from enforcing an unconstitutional action, *Ex Parte Young*, 209 U.S. 123 (1907); and, that in waiving its immunity and consenting to suit in federal court the Eleventh Amendment does not bar an action against a State, *Clark v. Barnard*, 108 U.S. 436 (1883), but the State's waiver must be stated by the most express language, *Edelman v. Jordan*, 415 U.S. 651 (1974). In balancing the Federal and State constitutional interests, however, the Court has recognized "that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst* at 465 U.S. 105.

Court's incorporation of traditional sovereign immunity principles into the Eleventh Amendment, the Court's jurisprudence has categorically rejected the argument that the Eleventh Amendment was intended to immunize the States in certain respects but not others, save for the narrow exceptions relating to aspects of federalism noted above at footnote 3. As such, the Court's jurisprudence does not support the notion advocated by Petitioners and their *amicus* that the intent of the Eleventh Amendment was only, or even primarily, to safeguard the States' treasuries from suits in the federal courts. Quite the opposite, the Court's jurisprudence has viewed the Amendment's protection broadly as encompassing any and all suits against the sovereign States on the basis of traditional common law principles of sovereign immunity. Explaining the rationale for the traditional common law doctrine of sovereign immunity, Justice Holmes wrote for the Court: "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907). Furthermore, "the general rule of sovereign immunity, is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury ***or*** domain, ***or*** interfere with the public administration,'[citation omitted] ***or*** if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); emphasis added.) *See*, *Pennhurst* at 465 U.S. 101, n.11 relying on the traditional sovereign immunity rule in Eleventh Amendment analysis. Plainly stated, the perquisite of sovereignty leads to immunity from any challenge to the authority of the sovereign's laws, not only challenges which directly endanger the sovereign's fisc.

Indeed, the express language of the Eleventh Amendment itself indicates that the States were intended to be immunized in all suits and challenges as was the case under the common law. The Amendment provides that the States be immunized from "any suit in law or equity," a clear

demonstration that ***any and all*** -- not simply a selection of some -- suits in law or equity against the states were intended to be the subject of the immunity.[4] In interpreting the meaning of the term "suit," the Court has made it clear that the Constitution's purpose was to immunize the States from a broad class of actions, not simply actions for money damages impinging directly against the States' treasuries:

> 'What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. . . . To commence a suit is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance.' [*Missouri v. Fiske*, at 290 U.S. 26-27 (1933) (quoting *Cohens v. Virginia*, 19 U.S. 264, 407-408 (1821).]

Quite obviously, the definition of "suit" under the Court's Eleventh Amendment jurisprudence is broad in scope and includes any claim, demand or request made against a State whether it impacts upon the States' treasuries or otherwise infringes on "public administration," *Dugan, at 372 U.S. 620.*

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[4] Under the Court's expansive reading of the Amendment's protection, the Court has ruled that the Amendment also extends to actions other than those in law and equity: *Ex Parte New York*, 256 U.S. 490 (1921)(admiralty); *Blatchford v. Native Village of Noatak and Circle Village*, 111 S. Ct. 2578 (1991)(Native American tribes); and, *Monaco v. Mississippi*, 292 U.S. 313 (1934) (claims by foreign governments).

Notwithstanding the fact that the motive for the adoption of the Eleventh Amendment at the conclusion of the eighteenth century was to quiet concerns relating to the prosecution in Federal courts of the States' war debts,[5] the Court has ruled without equivocation that this historical motive is of no moment to the Amendment's jurisprudence:

> The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of State debts in the Federal courts ***cannot be regarded . . . as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited.***[*Fiske* at 290 U.S. 27.]

More recently, in *Cory v. White*, 457 U.S. 85 (1982), the Court reiterated that the Eleventh Amendment must not be construed as immunizing the States only in specific suits where liability must be paid from the state treasury: "*Edelman* recognized the rule 'that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment [citation omitted], ***but never asserted that such suits were the only ones so barred.***" *Cory* at 457 U.S. 90, n.2; emphasis added. Leaving absolutely no doubt that the Eleventh Amendment cannot be relegated to actions which only impose liability on the state treasury, the Court declared:

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[5] As pointed out by the Court in *Cohens, supra*: "It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures." *Cohens* at 19 U.S. 406.

> ***Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought.*** . . . To adopt [a] rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition. [*Cory* at 457 U.S. 91-92; emphasis added.]

These words by the Court in *Cory*, *Dugan* and *Fiske* directly negate petitioners' argument in Point II of their brief which suggests that the *raison d'être* of the Eleventh Amendment is only to protect public funds "in the state treasury" regardless of any other impact on the States. The Eleventh Amendment and its jurisprudence clearly reject such a narrow reading which would reduce the Amendment's "fundamental constitutional protection" accorded to the States to a rote bookkeeping examination as to exactly where a State will feel the financial pinch of a judgment against it or one of its agencies.

This unequivocal language by the Court leaves no room to argue, as petitioners do, that *Edelman* and *Ford Motor Company v. Dept. of Treasury of State of Indiana*, 323 U.S. 459 (1945), stand for the proposition that all suits against the States will be barred only if their impact will be felt directly on the State's centralized treasury. *Edelman* and *Ford* are distinguishable cases involving personal defendants employed by State offices whose budgets depended on the general fund as opposed to other accounts established by the States.

B. THE COURT'S RULINGS IN *LAKE COUNTRY* AND *MT. HEALTHY* DID NOT ASSIGN PREEMINENCE TO THE "STATE TREASURY" FACTOR, A CRITERION WHICH LOOKS TO WHETHER THE CENTRALIZED TREASURY OF A STATE IS DIRECTLY RESPONSIBLE FOR ALL AGENCY JUDGMENTS, BECAUSE THE COURT ULTIMATELY CONSIDERED WHETHER AN AGENCY, IN TOTO, IS CONTROLLED BY THE STATE AND THIS RESULT IS CONSISTENT WITH ELEVENTH AMENDMENT PRINCIPLES OF SOVEREIGN IMMUNITY AND FEDERALISM AND THE COURT SHOULD NOW SO REAFFIRM

Consistent with the Eleventh Amendment's principles of sovereign immunity and federalism, immunity available to the States is similarly available to the States' agencies. Reciting the general rule, this Court stated, "[a] suit generally may not be maintained directly against the State itself, ***or against an agency or department of the State***, unless the State has waived its sovereign immunity." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982); emphasis added; *Edelman, supra*; *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U.S. 459 (1944). As state *amici* describe herein, the test for determining whether a state agency is the *alter ego* of the state is whether the state controls the agency, directly or indirectly, and the agency acts to further state policies.

1. THE COURT'S DECISION IN *LAKE COUNTRY* FOCUSED ON WHETHER AN AGENCY, IN TOTO, IS STATE-CONTROLLED WITHOUT ENDOWING ANY ONE SPECIFIC FACTOR WITH PRIMACY OVER OTHER FACTORS

In *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979), the Court addressed the question of whether a regional planning agency created by compact between the States of California and Nevada was entitled to immunity

under the Eleventh Amendment. At issue in the case were allegations by property owners that, in promulgating a land use ordinance, the Tahoe Regional Planning Agency ("TRPA") and its members had engaged in an unlawful taking. This Court reversed the Court of Appeals for the Ninth Circuit, ruling that because TRPA was more comparable to a county or municipality it was not entitled to partake in the States' immunity. In so ruling, the *Lake Country* Court considered a number of factually-based questions, enumerated below, to reach its decision: (1) was TRPA created as a "separate legal entity"; (2) was TRPA a "political subdivision"; (3) who appointed TRPA's governing members; (4) where did TRPA's funding come from; (5) was the "state's treasury" directly responsible for judgments against TRPA or would a judgment against the entity have "essentially the same practical consequences as a judgment against the State itself"; (6) was TRPA engaged in a function traditionally performed by local governments; (7) was TRPA subject to a veto from its founding states; and, (8) was TRPA subject to the control of the founding states. *Id. 440 U.S. 401-402.* [6] The Court also noted that absent "good reason" to believe that the States structured TRPA to enjoy the States' constitutional protections, the agency would not be immunized.

In answering these questions, the Court concluded that TRPA was created as a separate legal entity and as a "political subdivision," with six of its 10 governing members appointed by counties and cities; TRPA's funding was provided by counties, and its liabilities were not binding on either State; TRPA performed traditional local functions, was not subject to the States' veto and the States had to resort to litigation to control TRPA.

The *Lake Country* Court did not assign any one criterion a preeminent role over the others even though, in the

[6] While eight factors are enumerated herein, some lower courts have combined some of these factors and refer to six factors as originating out of *Lake Country*.

aggregate, the Court ultimately focused on the solitary question of whether the States controlled TRPA or whether it enjoyed autonomy from the State.[7] In weighing the factors, the Court thus apparently concluded that because TRPA was controlled by the counties -- financially **and** politically -- it was not eligible to be immunized under the Eleventh Amendment even though it was originally founded by two States.[8]

While *Lake Country* listed factors for distinguishing between the characteristics of a state and a local entity, the Court was silent in supplying a conceptual framework for the resolution of arm-of-the-state questions and did not clearly anchor its decision to the precepts of Eleventh Amendment jurisprudence. In so doing, as one commentator put it, "the Court perpetuated the ambiguities surrounding the arm-of-the-state doctrine by failing to explain the purpose underlying its effort to define the entities and by neglecting to rank the criteria according to their determinative value." *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*. 92 COLUM. L. REV. 1243, 1264 (1992). Consequently, in applying the *Lake Country* framework, the Circuit Courts of Appeals have developed a variety of arm-of-the-state tests with wide differences in their application and results.

While some of the Circuit Courts of Appeals look at *Lake Country* for guidance, other courts have sought direction

[7] Items 1, 2, 3, 7, and 8 above clearly address issues of TRPA's State control and vast autonomy from the States. In context with these "control" factors, Items 4 and 5, while relating to financial questions, nevertheless answer who is ultimately in control of TRPA's resources. In TRPA's case, the Court found that the counties had control over TRPA's governance and its funding.

[8] Unlike the writ now before the Court involving the Port Authority of New York and New Jersey, in *Lake Country* TRPA's founding States, California and Nevada, affirmatively disclaimed any intent to confer immunity on TRPA.

from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the Court ruled that, in spite of large financial contributions from the State to a school district, the State had no direct control over the district -- having only "some guidance" powers over the entity -- and the district's ability to raise money independently through taxes and bonds outweighed the State's ability to control the district through its large contributions. In *Mt. Healthy*, the Court listed four factors which it used in its arm-of-the-state analysis: (1) the state law designation of school districts as political subdivisions; (2) the degree of supervision by the State over the school district; (3) the level of funding received by districts from the State; and, (4) the ability of the district to generate revenue through bonds and taxes. Quite clearly, in its analysis the *Mt. Healthy* court, like the *Lake Country* Court, focused at the ultimate control exercised by the State over its agencies.

2. THERE EXISTS AMONG THE CIRCUITS A MULTIPLICITY OF ARM-OF-THE-STATE TESTS WHOSE APPLICATION HAS PRODUCED INCONSISTENCIES IN THE ADMINISTRATION OF THE ELEVENTH AMENDMENT'S FUNDAMENTAL CONSTITUTIONAL PROTECTION

While the Circuit Courts of Appeal often cite *Lake Country* or *Mt. Healthy* as support for their holdings in arm-of-the-state cases, each Circuit employs a different test and most have adapted factors which differ across the Circuits and, at times, are accorded, on a case-by-case basis, varying application.[9] The vast majority of Circuits, however, have

[9] The First Circuit's arm-of-the-state test employs a seven-factor formula, *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 991 F.2d 935 (1st Cir.1993). The Second Circuit a six-prong test, *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628 (2nd Cir.1989), *aff'd on other grounds*, 495 U.S. 299 (1990). The Third Circuit's nine-prong test was folded into a three-part test, *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3rd Cir.1989), *cert. denied*, 493 U.S. 850 (1989). The Fourth Circuit uses the *Mt. Healthy* four-prong (continued...)

concluded that the state treasury factor is the most important factor to be considered in the arm-of-the-state analysis and, in practice, have generally accorded this factor dispositive weight. Demonstrative of the confusion which exists in the Circuits is the status of the Port Authority as viewed by the Second and Third Circuits.

The Third Circuit's arm-of-the-state test applied in *Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3rd Cir. 1987), used a nine-factor test, using three additional factors outside of *Lake Country*, originating from *Urbano v. Board of Managers*, 415 F.2d 247 (3rd Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). In contrast, the Second Circuit's test in *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628 (2nd Cir.1989), *aff'd on other grounds*, 495 U.S. 299 (1990), broadly invoked the *Lake Country* factors but accorded the state treasury factor preeminence. *Id.* at 873 F.2d 631.

[9](...continued)
test, *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir.1987), and *Ram Ditta v. Md. Nat. Capital Park and Planning Comm'n.*, 822 F.2d 456 (4th Cir. 1987). The Fifth Circuit uses a six-factor test different from the one used in *Lake Country*, *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991). The Sixth Circuit employs what appears to be a four-part test, *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir.1993), *cert. denied*, 114 S Ct. 1071 (1994). The Seventh Circuit employs a different four-factor test, *Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775 (7th Cir.1991). The Eighth Circuit most recently appeared to rely on the nine-part test which the Third Circuit had used before modifying its test to a three-large-factors test, *Sherman v. Curators of University of Missouri*, 16 F.3d 860 (8th Cir. 1994). The Ninth Circuit utilizes a five-part test, *ITSI TV Productions v. Agricultural Ass'c.*, 3 F.3d 1289, 1292 (9th Cir.1993); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991). The Tenth Circuit used a two-part test and has subsequently adopted the *Mt. Healthy* factors, *In Ambus v. Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993). The Eleventh Circuit engages a three-part test, *Robinson v. Georgia Dept. of Transp.*, 966 F.2d 637 (11th Cir.1992), *cert. denied*, 113 S Ct. 660 (1992). Lastly, the D.C. Circuit utilizes a test composed of the *Mt. Healthy* and *Lake Country* standards. *Morris v. Washington Metro Area Transit Authority*, 781 F.2d 218 (D.C. Cir. 1986).

Applying their respective tests to the same agency and examining the same facts, both Circuits arrived at opposite conclusions: While the Third Circuit's analysis concluded that the limits imposed by the States on the agency indicated that it was not an independent corporation, the Second Circuit determined that there was no significant difference between TRPA's independent status in *Lake Country* and the Port Authority's independence from its parental States. Additionally, applying the state treasury factor to the Port Authority, the Second Circuit held that the agency's liabilities were insulated from the States' central treasuries whereas the Third Circuit concluded that, even though the Port Authority was self-sufficient, the Authority "would be able to go to the state legislature" to recoup needed funds and this "indirectly . . . could have some impact" on the States' treasuries.

While the Third Circuit's analysis applied an "indirect impact" state treasury test to the Port Authority, two years later in *Fitchik v. New Jersey Transit Rail Operation*, 873 F.2d 655 (3rd Cir. 1989), *cert. denied*, 493 U.S. 850 (1989), the Third Circuit, using the same *Urbano* test, ruled that New Jersey's mass transit agency was not the arm of New Jersey. This result was reached even though the agency was represented by the State Attorney General, had all its Board actions subject to the State's Governor's veto, had its governing board appointed by the Governor and legislature and, had been treated by state law as a State agency. The Third Circuit's rejection of sovereign immunity in *Fitchik* relied most acutely on the reasoning that the liabilities of the agency were not paid out of the State's treasury. The court reached this result even though the State's railroad was the recipient of over $150 million of State subsidies which originated directly from the State's general fund.

The inconsistencies in the lower courts' arm-of-the-state rulings can also be detected by the different treatment accorded similar type of agencies across the circuits. For instance, while the Third Circuit concluded that New Jersey's railroad was not immunized, *Fitchik, supra,* the Ninth Circuit recently ruled that Alaska's railroad was the alter ego of Alaska. *Alaska Cargo Transport. v. Alaska RR,*, 5 F.3d 378

(1993). Notably, in divergence from its own heavy reliance on the state treasury factor, the Ninth Circuit granted the State's railroad immunity because of the likelihood that the State would cover the agency's liabilities even though Alaska was not directly liable for money judgment against the railroad. With respect to state universities, the lower courts' decisions are equally confusing with one university granted immunity in one part of the country while a similar institution elsewhere is not. *Compare*, *Fuchilla v. Layman*, 537 A.2d. 652 (N.J. 1988), *cert. denied*, 488 U.S. 826 (1988) (state subsidized and controlled university not immune) and *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987) (university immune as judgments would impact the State's subsidies).

3. Application of Concepts of Sovereign Immunity and Federalism to the Arm-of-the-State Analysis Must Result in the Preeminence of the "State Control" Criteria Over the "State Treasury" Factor

As demonstrated above in Argument Part "A", the Court's jurisprudence over the last century has steadfastly reiterated the policy of the Eleventh Amendment as adopting the broad principles of the common law's sovereign immunity doctrine and respecting the States' full sovereignty within the Nation's federal structure. The Court's Eleventh Amendment jurisprudence, as shown, has clearly disavowed the argument that the borders of the Eleventh Amendment are strictly defined by whether a State's treasury is encumbered by a court's money judgment. In view of this well-established jurisprudence of the Amendment, it is an incongruity in logic to conclude, as some of the Circuits have done, that the state treasury factor must be treated as paramountly dominant over all other factors in engaging in arm-of-the-state analysis.

a. The State Treasury Factor Relies on Anachronistic Views of State Governments' Role in Governing Society

The state treasury factor, as it has come to be utilized in the Circuits, holds that unless the centralized treasury of a

State is directly made responsible for a State agency's debts or judgments, that State agency cannot be deemed to be acting as an arm of the sovereign and cannot be found immunized under the Eleventh Amendment. Under this logic, the States have been forced to step into a legal straightjacket tailored on the basis of an outdated pattern and understanding of government's role in modern society: Pursuant to this logic, any activity a State engages in outside the area which historically has been viewed as "governmental," or outside the traditionally accepted structure and manner in which States have offered governmental services to their citizens in the past, is deemed to be a non-immunized activity under the Eleventh Amendment simply because of the novelty of the activity or the innovative manner of its financing by the State.

This reasoning, however, fails to evaluate the modern role and obligations of State governments and applies an anachronistic view which is no longer in sync with modern concepts of federalism and sovereign immunity. In an era where government has made a commitment to provide a myriad of services to the public, it has also had to contend with the question of how to fund such programs without enacting inequitable taxing programs. As the Court pointed out in *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L Ed. 242, 247 (1821), "[t]he science of government . . . practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." [10] Experimentation with new and innovative fiscal models and structures to finance the cost of government is, most clearly, a functional obligation of a sovereign State and such activities cannot be labeled as

[10] For instance, as the Court has pointed out, in the area of establishing and operating mental health facilities the States' role dramatically changed from no involvement at all at the time of the Nation's establishment to active participation in the modern era. *See, Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 284, n.2 (1973).

private-like or proprietary.[11] Indeed, in *Garcia*, *supra*, the Court concluded that distinguishing between "governmental" and "proprietary" functions or attempting to define "historical," "essential," "usual," "traditional" or "strictly governmental" functions is an unworkable task in view of the evolution of the States' activities in modern society. *Garcia* at 469 U.S. 540-542. As the Court said:

> The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society.... Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. [*Garcia* at 469 U.S. 546.]

As noted by the Court in the analogous field of state immunity from federal taxation: "It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune . . . as were engaged in by the States in 1787. Such

[11] The creation of the Port Authority by New York and New Jersey is a fitting example of how during this century state governments have, in order to exercise their police powers more effectively and efficiently, embarked on activities which in prior generations were generally viewed as nongovernmental in nature. For example, establishing economic, bank-like, redevelopment institutions to encourage regional redevelopment, operating mass transit services and facilities such as PATH and the Port Authority Bus Terminal, administering the operation of tunnels, bridges and airports and, funding the purchase of buses and capital equipment to be used by other state agencies are activities which, today, are readily viewed as governmental but were private activities a century ago. New York and New Jersey provide these activities through their agent the Port Authority, thereby deriving fiscal benefits as well as operational and administrative advantages associated with technical expertise and modern management techniques.

a static concept of government denies its essential nature." *New York v. United States*, 326 U.S. 572, 579 (1946).

Plainly, then, utilization of a preeminent state treasury factor in arm-of-the-state analysis is wholly inappropriate as it requires the federal judiciary to make certain out-of-date assumptions about how a state government should and must act in fulfilling its mission of governance. In utilizing this factor, the federal courts create an artificial dichotomy between sovereign activities, i.e., those which are financed directly out of the centralized state treasury, and all other state activities which are set aside as non-sovereign because their funding is accomplished in a nontraditional manner. Other than being hypertechnical and entirely inflexible, this factor disregards the evolution of a sovereign's obligations in this century.[12]

b. Judicial Use of the State Treasury Factor Compels the States to Relinquish their Sovereign Immunity in Order to Make Government Efficient

Quite obviously, except in the narrow instances where federal supremacy so demands, the Eleventh Amendment's tenets of sovereign immunity and federalism did not intend to compel or cajole the States into relinquishing their broad sovereignty as the price for exercising modern methods of governance. Indeed, this Court has held time and again that sovereign immunity may only be relinquished by the States upon a voluntary and unequivocal consent. *Department of Health v. Florida Nursing Home*, at 450 U.S. 150 (State's general waiver of sovereign immunity not a waiver of

[12] For example, in New York the number of public authorities jumped from six in 1960 to 36 in 1990; New Jersey had chartered 14 intrastate and five bi-state authorities by 1981; and Alaska created 10 government corporations in five years. *See, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine* at 92 COLUM. L. REV. 1247-1252 for a discussion of the evolution and expansion of the States' programs and their growing reliance on specialized State agencies and authorities.

Eleventh Amendment). The preemptive utilization of the State treasury factor over all other considerations in the arm-of-the-state analysis violates this rule and coerces the States into choosing between either: (1) relinquishing their sovereignty but embarking on necessary governmental tasks which may involve the conduct of fiscal or other experiments in the governance of a modern polity or, (2) guarding sovereignty at the expense of staid, inefficient and unresponsive governance. This Hobson's choice, imposed upon the States by the application of a preeminent State treasury factor, most clearly forces the States to surrender their Eleventh Amendment sovereignty or, at the very least, impermissibly imperils State sovereignty each time the States embark on a new governmental venture.

As pointed out by the Court, the States' role as social and economic laboratories cannot be properly exercised if the States are forced to "pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands." *Garcia* at 469 U.S. 546. The loss of the Eleventh Amendment's "fundamental constitutional protection," *Puerto Rico Aqueduct* at 688, is, indeed, a steep price for the States to pay, resulting in the intrusion and interference of the federal judiciary into the States' sovereignty and the States' public administration of policies and programs, *Dugan* at 372 U.S. 620.[13] Additionally, the involuntary loss of sovereignty inherent in the application of a preeminent state treasury factor

[13] The success of New York and New Jersey's experimentation with novel methods of governance and financing to meet emerging societal problems during this century is evident in the case of the Port Authority. As pointed out in this brief's Statement, this entity created and controlled by New Jersey and New York is a modern State governance tool designed for dealing with critical problems facing the two States. This experiment in governance not only pays its way without imposing a financial burden but also makes a positive contribution to the fiscal status of New York and New Jersey. To demand that New York and New Jersey make a choice between their sovereignty and their right to experiment with efficient governance methods is inconsistent with the Eleventh Amendment and its jurisprudence.

also deprives the States of their equally important constitutional prerogative as coequal sovereigns not to be dragged into federal court without consent. *Puerto Rico Aqueduct* at 113 S.Ct 689, n.5.

Under our federal system of government, the sovereign States of the Union were not intended to be pressured or manipulated in executing their sovereign obligations. Unless the States act in conflict with the Federal Government's supremacy powers or act in a manner inconsistent with the Constitution, the federal judiciary must not hinder the proper execution of State powers by imposing barriers, such as the loss of sovereign immunity, when the States are exercising their governance obligations as dictated by modern exigencies.

c. THE ELEVENTH AMENDMENT, ITS JURISPRUDENCE AND THE COURT'S RULING IN *LAKE COUNTRY AND MT. HEALTHY* JOINTLY REQUIRE THAT THE ARM-OF-THE-STATE ANALYSIS BE PRIMARILY FOCUSED ON STATES' CONTROL OF AGENCIES

In the final analysis, all the factors set forth in *Lake Country* and *Mt. Healthy* answer the ultimate question of who in fact controls a State agency. This reading of *Lake Country* and *Mt. Healthy* harmonizes these rulings with the intent of the Eleventh Amendment and with the Court's Eleventh Amendment jurisprudence and supplies a test doctrinally accurate and more practical in application. Should the Court accept this standard, as State *amici* strongly urge, a conceptual bright line will be laid for the lower federal courts, providing needed conceptual guidance to help steer the judiciary and the States through the waters of the arm-of-the-state doctrine.

Because the overriding principle of sovereign immunity analysis is based on the sovereign's control of its dominion, the appropriate question in arm-of-the-state analysis is whether the State controls an agency's overall direction and policies. The state treasury factor, we respectfully submit, may still be used in instances where other indicia of control are weak or unclear but should not be accorded a preeminent or dispositive role and must be seen as one of a set of instruments to be

utilized to measure whether an agency is, ultimately, controlled by its creating State. Thus, in the absence of other indicators of juridical or political control by the State over an agency, the state treasury factor, properly defined so as to shed its current preemptive character, can assist by demonstrating if the financial obligations of an agency are, ultimately, passed on to the State as a result of either legal or practical constraints. For example, where the State has in practice committed itself to appropriate resources in favor of an agency, thereby guaranteeing its survival, or where the agency is a net contributor of funds to the State, any loss of resources by the agency will inevitably impact on the State's bottom line with fewer resources available to be spent elsewhere by the State. Consequently, such a result has the "same practical consequence" as a liability imposed upon the State.

Other than for the financial deprivation which is felt by the State when a federal judgment is entered, a federal court's money judgment against a State-controlled agency forces the State to surrender an element of its control as a sovereign over its destiny; limiting its resources and thereby its choices as to whether or how to implement policies and programs. Quite simply, loss of resources as a result of federal judicial intervention against State-controlled agencies translates most clearly into a diminished level of State sovereignty and discretion.

In examining the question of a State's control over an agency, it is of importance to determine the intention of the State in creating the agency and reference to state law may answer this query. If the intention is clearly manifested on the face of an agency's enabling legislation that the agency was intended to be the State's "agent" or, for example, if the agency was created to effectuate a public policy or a particular mission on behalf of the State, a strong presumption must be created that, regardless of any other indicator -- such as the mode of funding or the juridic character of the entity -- the agency was created by the sovereign and for the benefit of the sovereign and therefore must be presumed to partake in the sovereign's immunity. Indeed, where the State directly or

indirectly, controls the agency's direction and policies through control over its governing personnel or otherwise, such as control by the State Attorney General over the agency's litigation and legal compliance, the presumption of sovereign immunity is obviously strengthened.

In the event, however, that a "clearly articulated and affirmatively expressed state declaration"[14] is not presented, resort to State decisional law may clarify the State's intentions in establishing the agency. Reference, however, to such legal factors as "sue and be sued" are not illuminating, *Smith v. Reeves*, 178 U.S. 436, 441 (1899) (a State's general consent to be sued is not an express declaration of consent to be sued in federal court). Similarly, the terminology "body politic and corporate" is of minimal utility as it has been interpreted broadly and has included municipal as well as State agencies, *Cotton v. U.S.*, 52 U.S. 230, 231 (1850) (every sovereign State is of necessity a body politic). Usage of such vague and, in some cases, outdated terms and concepts only serves to perpetuate the difficulties associated with the application of the arm-of-the-state doctrine and should be avoided.

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[14] Drawing on the analogous area of state action in antitrust law, where municipalities do not share in a State's antitrust exemption unless a showing is first made that the municiplity acted pursuant to a clearly articulated and affirmatively expressed state policy, one commentator has suggested that application of a similar test to the arm-of-the-state doctrine would introduce greater clarity, simplicity and consistency. *See* 92 COLUM. L. REV. at 1304. See *Hallie v. Eau Claire*, 471 U.S. 34, 39 (1985).

CONCLUSION

The result reached by the United States Court of Appeals for the Third Circuit holding that the Port Authority of New York and New Jersey is immune under the Eleventh Amendment should be affirmed.

Respectfully submitted,

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